IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 805.

HENRY G. WOOD, JO V. MORGAN, ALEXANDER TUCKER, J. H. LEWIS,

Petitioners,

vs.

J. MILLARD TAWES, COMPTROLLER, STATE OF MARYLAND; HARRY O. LEVIN, THOMAS W. KOON, J. DEWEESE CARTER, STATE TAX COMMISSION, STATE OF MARYLAND.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

The petition for certiorari seeks under Section 237(b) of the Judicial Code, as amended to review the judgment of the Court of Appeals of Maryland, entered December 18, 1942, by which said Court affirmed the State Tax Commission of Maryland and the Circuit Court for Montgomery County, Maryland, and held:

(1) That Maryland may constitutionally tax the income of non-domiciled persons who are residents under its statutory definition;

(2) That there is no constitutional discrimination in subjecting to State income tax for the year 1939 the compensation of Federal employees, resident in Maryland merely because a limited number of public officers of Maryland were exempted from income tax for that year under the provision of the State Constitution (Section 35 of Article III) that the salary of a public officer of the State cannot be diminished during his term of office, and because the Court of Appeals held in *Gordy v. Dennis,* 176 Md. 106, that an income tax Act passed during his term diminished the salary of an officer;

(3) In the case of Henry G. Wood that there was no constitutional objection to taxing that portion of his income received prior to March 23, 1939 when he bought a house in Montgomery County and admittedly became domiciled in the State, and has since remained so domiciled. The State Tax Commission of Maryland had so held but the Circuit Court for Montgomery County, Maryland, had reached a contrary conclusion on this point.

OPINIONS BELOW.

The rulings of the State Tax Commission of Maryland (R. 12, 26, 45 and 66) are not reported. The opinions of the Circuit Court for Montgomery County, Maryland (R. 15, 29, 49 and 69) are not reported. The opinion of the Court of Appeals of Maryland (R. 79-87) is reported in 28 A. (2d) 850.

ARGUMENT.

THERE IS NO FEDERAL QUESTION, NOR SUBSTANTIAL QUESTION INVOLVING THE CONSTITUTION OF THE UNITED STATES IN ANY OF THE THREE POINTS PRESENTED.

I.

The statutory definition of "resident" in the Maryland Income Tax Act is valid.

Section 230 of Article 81 of the Annotated Code of Maryland (1939 Ed.), enacted by Ch. 277 of the Acts of the General Assembly of Maryland, 1939 Session, imposes a tax "on the net income of every resident individual of this State." Section 222(i) of said Article of the Code defines a "resident", within the meaning of Section 230, as "An individual domiciled in this State on the last day of the taxable year, and every other individual who, for more than six months of the taxable year maintained a place of abode within this State, whether domiciled in this State or not."

Residence apart from domicile is an entirely reasonable and relevant basis of personal taxation. It has been so held by a number of Courts and writers from the earliest times until the present. See *New York, ex rel. Ryan v. Lynch* (1933) 262 N. Y. 1, 186 N. E. 28; *Chestnut Securities Co. v. Oklahoma Tax Commission* (1942) 125 Fed. 2d 571 (cert. den., 316 U. S. 668); *Bowring v. Bowers,* 24 Fed. 2d 918 (C. C. A. 2d), cert. den. 277 U. S. 608; *Head v. Maxwell* (Ga., 1939) 4 S. E. 2d 45; *Colchensky v. Oklahoma Tax Comm.* (1938) 86 Pac. 2d 329; *Goldberg v. Gray,* 297 N. W. 124; *Attorney General v. Coote* (1817) 4 Price 183-187, 146 Eng. Reprints 423; *Inland Revenue v. Cadwalader* (1904) 7 Sc. Session (5th Ser.) 146-149; *Ottawa v. Nantel* (1921) 51 Ont. L. Rep. 269-276, 69 D. L. R. 427-433; The Problem of Residents in State Taxation of Income, 29 Cal. Law Re-

view 706 (1941); Residence in Income Tax, L. T. 185-277, April 8, 1938; *Soucy v. Knight,* 52 R. I. 405, 409.

It is, of course, settled beyond question, and admitted by the Petitioners that domicile will constitutionally support a tax on income from all sources, including those without the State. *Lawrence v. Tax Comm.,* 286 U. S. 276; *Cohn v. Graves,* 300 U. S. 308. It is likewise clear that a State may tax net income of non-residents from their property, businesses or service within the State. *Shaffer v. Carter,* 252 U. S. 37, 57; *Travis v. Yale & Towne Mfg. Co.,* 252 U. S. 60. This is only to say in another way that the State may tax where its power so exercised bears relation to protection, opportunity and benefits given by the State. The controlling question is whether the State is given anything for which it can ask return. *Wisconsin v. Penney,* 311 U. S. 435; *Graves v. Schmidlap,* 315 U. S. 657; *Curry v. McCanless,* 307 U. S. 357.

This Court has never held that residence alone, as distinguished from domicile, is sufficient to maintain a State income tax, although *Shaffer v. Carter,* supra, and *Lawrence v. Tax Comm.,* supra, clearly accept the premise as unnecessary to discuss and as unchallenged.

The language of *Cohn v. Graves,* supra, is highly significant. In this case, New York was permitted to tax its resident on income from loans and mortgages in another State. The opinion says at pages 312-313 of U. S. 300:

> "That the receipt of income by a *resident* of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privilege of *residence* in a State and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. Taxes are what we pay for civilized society. A tax measured by the net

> income of *residents* is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax which is apportioned to the ability of the taxpayer to pay it *is founded upon the protection afforded by the State to the recipient of the income in his person, in his right to receive the income, and in his enjoyment of it when received.*" (Italics supplied.)

The fact that the opinion says that domicile itself is a sufficient basis for taxation, coupled with a subsequent discussion of residence as such, and the benefits thereof, is strong evidence that residence alone, one of the historical components of the concept of domicile, is actually the controlling element which permits taxation. Indeed, when the reasons why the cases say domicile is sufficient are considered, there seems to be no escape from the conclusion that residence is sufficient. Domicile is a highly unrealistic legal concept. Residence from a tax standpoint is much more realistic. See *Texas v. Florida*, 386 U. S. 398, 429.

This Court has at least twice denied certiorari when residence was held below to be sufficient basis for income taxation. In *Bowring v. Bowers*, supra, 24 Fed. 2d 918, cert. den., 277 U. S. 608, an English businessman resided for much of the time in New York where he owned a place of abode. He was admittedly domiciled in England. The United States Income Tax Statutes taxed the entire income of aliens resident in this country. The Circuit Court of Appeals for the Second Circuit pointed out that, "Residence has been construed by the Commissioner in all of his rulings as something which may be less than domicile," and held the taxpayer liable for tax on his entire income, saying at page 921:

> "But in personal and income taxes domicile has played no necessary part and residence at a fixed date has determined the liability of the tax. * * *

> "In any event, we are bound by the long unquestioned construction of the term *'residence'* by the Department charged with the administration of the revenue acts. The word is fairly capable of the meaning they have given to it *and has often received that interpretation in income tax legislation from the earliest times.* Mr. Bowring acquired an abode here of no transient character and so long continued and so substantial as to be of a permanent nature. He certainly became a resident within the meaning of the Department's regulations. We hold this valid." (Italics supplied.)

In *Chestnut Securities Co. v. Oklahoma Tax Comm.*, supra, 125 Fed. 2d 571, cert. den. 316 U. S. 668, Oklahoma established by its laws a statutory definition of "residence" for both corporate and individual taxpayers. The definition of an individual resident was similar to that of Maryland, the only difference being that seven months of abode were required, instead of six, in any taxable year. The Court held the definitions valid and applicable, and said in conclusion:

> "Thus whether the power to tax rests upon jurisdiction of the person because of residence or citizenship, *Colchensky v. Oklahoma Tax Comm.*, supra, or upon the property located within the State with citizenship elsewhere, *the power to tax is equally plain and within constitutional limits.*" (Italics supplied.)

In the case of *New York ex rel. Ryan v. Lynch*, supra, there was challenged the New York statute which defined a resident for income tax purposes as one who maintains a permanent place of abode within the State and spends more than seven months of the taxable year within the State. The Court said:

> "The definition of 'resident' in the tax law supra, presents no constitutional question. The question here is merely whether such definition rests on a fair

> or substantial basis. This question has no legitimate bearing on any question raised under the Federal Constitution. The decision depends upon the general operation and effect of the statute (*Shaffer v. Carter*, 252 U. S. 37 at P. 55). * * * The statute in itself is quite valid under the Federal Constitution as giving a legitimate definition to the word 'resident'."

The facts in this case including those as to domicile and residence are either stipulated or undisputed, and are accurately set forth in the Brief of the Petitioners, the Record and the decision of the Court of Appeals of Maryland (R. 79).

Mr. Morgan has been domiciled and resident in Maryland all of his life, including, of course, the year 1939.

Mr. Tucker, although domiciled in New Jersey, had lived for three years in Maryland in the same apartment in which he lived during all of the year 1939.

Colonel Lewis, although domiciled in Michigan, lived all of 1938 and 1939 in Maryland.

Mr. Wood became domiciled in Maryland in March 1939, having bought a house in Montgomery County, Maryland, and admittedly has since been domiciled and resident in the State.

It is clear, therefore, that the State of Maryland has given to each of the petitioners benefits and opportunities for which it can exact a fiscal return within the decisions of this Court. It is likewise clear that all of the petitioners, as the Court of Appeals points out (R. 83, 84), were in the State for a definite period that was not transient, and all maintained a place of abode in such a manner and for such a length of time as to afford a constitutional basis for taxation. Some twenty States employ in income tax statutes a definition of "residence" similar to that used in the

Maryland Act. None, as far as is known, has been held invalid. A reference to these States and statutes will be found in the Appendix.

II.

The petitioners were subject to no constitutional discrimination in being required to pay Maryland income tax for the year 1939.

This Court said in *Graves v. New York ex rel O'Keefe*, 306 U. S. 466, 480, that

> "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."

See also:

Helvering v. Gerhardt, 304 U. S. 405;
State Tax Comm. v. VanCott, 306 U. S. 511.

Following the *Gerhardt, O'Keefe* and *Van Cott* cases, Congress enacted the Public Salary Tax Act, now codified as U. S. C. A. 5, par. 48A, which, it is submitted, is merely a legislative declaration of the rule of these cases to show the intention of Congress to permit non-discriminatory State taxation of Federal employees, which did not directly affect the functions of the central government. It is to be noted that the Public Salary Tax Act expressly permits taxing the compensation of Federal Officers "if such taxation does not discriminate against such officer or employee *because of the source of such compensation.*"

The Appellants' claim of discrimination is based on exemption from Maryland income tax for the year 1939 of the salary of a very small percentage of officials of the State government, which was derived from Section 35 of Article III of the State Constitution, providing in part, "nor shall the salary or compensation of any public officer be increased or diminished during his term of office." *Gordy v. Dennis,* supra, 176 Md. 106, held that an income tax is a diminution of salary so that the above provision exempted the salaries of some public officers for the year 1939. (This exemption was removed by an amendment to the Constitution, now Section 35A of Article III for the year 1940 and thereafter.) The exemption was a limited one involving the following characteristics:

(1) The individual exempted must have been a public officer taking an oath of office;

(2) The exemption was limited to a tax imposed during his term of office which presupposed a fixed and definite term;

(3) The term of office must have commenced before April 13, 1939, the effective date of the Income Tax Act;

(4) Persons in the exempt category not only were protected from diminution of salary, *but could receive no increase in salary.* (Except Judges.) A price was paid for the exemption. This, to respondents seems to have removed the exemption from the discriminatory category since it was coupled with a limitation not applicable to persons who did not come within the exception;

(5) Many of the officers exempted from the income tax were subject to a tax on official commissions, payable under Section 101 of Article 81 of the Code. This tax derives from an Act of 1843 representing an attempt to equalize the remuneration received by various State officers in view of the State income tax of 1841.

With these considerations in mind, it is pertinent to compare the Petitioners here with the State officials to whom they claim resemblance. As Chief Judge Bond, speaking for the Court, said below (R. 84, 85):

> "But a difficulty in the way of the argument of discrimination against federal public officers is that the exemption which actually resulted was not so general as supposed. There is no showing in the record of these present cases that Maryland officers in comparable positions were exempted, and such information as the court has is that no similar officer in the state was (fol. 86). And we must take it to be so, as the burden of showing the discrimination charged is on the appellants' charging it.
>
> "The Maryland director of the Department of Legislative Reference, whose position might be regarded as similar to that of Mr. Wood, is not a state officer included within the provisions of Article 3 section 35, that the salary or compensation of a public officer of the state shall not be increased or diminished during his term of office. He has no definite term of office. Acts 1906, ch. 565, Code, Art. 41, secs. 101, 102. And his salary has, in fact, been increased from time to time. Acts, 1935, ch. 92, 1937, ch. 515; and 1939, ch. 284. The members of the State Tax Commission, in whose positions Mr. Morgan seeks an analogy, did not, so far as we are informed, enjoy exemptions of their salaries, if, indeed, they are public officers. The deputies and assistants of the Attorney General of Maryland are without definite terms of employment, and their salaries were not exempted. And no officer of the National Guard of the state, even including the Adjutant General at the head of all of them, enjoyed such an exemption, because they were not regarded as within the class of public officers affected by the cited sections."

It is to be noted that Mr. Tucker claimed that his position was similar to that of Assistant Attorney General of the

State, and that Colonel Lewis related his duties to those of the Adjutant General of Maryland, Major General Milton A. Reckord. The jurisdiction and functions of the Board of which Mr. Morgan is a member, and those of the State Tax Commission of Maryland are quite different as a full comparison will show. The Commission receives, records and approves certificates of incorporation, charter amendments, stock issuance and stock reduction statements, collects bonuses and corporate franchise taxes, and passes on the qualification and registration of foreign corporations. Mr. Morgan's Board does none of these things. It is submitted that, in view of the aforegoing, none of the Petitioners can validly claim discrimination based on the ground of similarity of his office to a tax exempt office in Maryland.

Alive to the difficulties which confront them on this point the petitioners claim that the exemption of the few Maryland officials is a general discrimination against them under the Federal Constitution and the Public Salary Tax Act. To lend it support, they are forced to argue in this fashion:

(a) Certain Maryland officials are exempt because they are paid by the State;

(b) Petitioners are paid by the Federal Government, and are not exempt;

(c) Therefore, Petitioners are taxed because of the source of their compensation.

There are fatal weaknesses in this argument. First, an incidental and occasional exemption cannot be discriminatory in a legal sense and is not, as a matter of fact, in the actual sense. Second, the exemption under the Maryland Constitution is coupled with burdens not applicable to those outside the exemption, in that there can be no increase in compensation during the term of office, and the

office holder very often had to pay the tax on official commission as an offset to non-liability for the income tax. Third, the argument is based on the fundamental fallacy that the exemption results from the source of compensation for the exempt class. This is not so. Petitioners are subject to tax, not because they receive their income from the Federal Government, nor because they do not receive it from the State, but merely because they do not happen to be members of that limited class sheltered by the State Constitution. For example, Mr. Carter, a member of the State Tax Commission of 1939, was taxable on his compensation for that year, since he took office after the income tax act. The persons in the Classified Service under the Merit System are taxable on their compensation. The Assistant Attorneys General are taxable on their compensation, as are practically all other persons receiving compensation from the State. The source of compensation is not the determining factor. The exemption, as has been shown, is based solely on a constitutional provision about which the State was powerless to do anything until the voters amended the Constitution, as they promptly did. The Income Tax Act of 1939 is a general non-discriminatory Act. It applies to Petitioners only in the same manner and to the same extent as it applies to every other resident of Maryland, except the incidental few whose salary as State officials could not be diminished by taxation. The tax does not discriminate against the Federal Government, its employees or anyone else. Petitioners are not taxed because they are Federal employees, but because they are residents of Maryland, and must share the cost of their State government with all other residents. What they seek in fact is to obtain the benefit of an incidental and unplanned exemption to a minute class to which they do not belong, and thus relieve themselves of the obligations of

the general mass of residents. See opinion of the Circuit Court for Montgomery County, Maryland, in the Morgan case (R. 33-35).

It is a settled principle that taxation need never be uniformly exacted and equal. Mere incidental and fortuitous inequalities do not serve to make the tax bad. The principle is succinctly stated in *Maxwell v. Bugbee,* 250 U. S. 525, where this Court said:

> "Absolute equality is impractical in taxation and is not required by the equal protection clause, and inequalities that result, not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."

See also opinion of the Court of Appeals on this point beginning at the third paragraph on page 85 of the Record.

III.

It is constitutional and proper to tax the entire income for the year of one who became domiciled in the State in March.

As is the case of the first two points, there is no Federal or substantial constitutional question involved in the third point. In the first place, there is no contention that Mr. Wood paid the tax on his income for 1939 accruing to him prior to March 23rd of that year, when he became domiciled in Maryland, to any other jurisdiction. If he had paid any other jurisdiction tax on that portion of his income or on any for the year, for that matter, payment would permit a deduction under Section 231 of Article 81 of the Annotated Code of Maryland (1939 Ed.).

The cases supporting the Petitioners on this third point have reached their result largely as a matter of statutory

construction and not on a question of constitutionality. The Court of Appeals decided in the instant case that the Maryland statute did reach the income for the entire year, and there would seem to be no constitutional barrier to this result. There can be no distinction in principle between taxing one's income earned prior to his becoming domiciled in the State, and taxing the income of one domiciled in the State for the entire year, although he had, as a matter of fact, been absent from the State for the whole year. It is conceded that Maryland could do the latter. *Lawrence v. Tax Comm., Cohn v. Graves,* both supra. As this Court said in the last cited case, the income tax is an equitable method of distributing the burdens of government among those privileged to enjoy its benefits. It can hardly be contended that the quid pro quo should be apportioned on a day to day basis. Incomes are not always earned periodically. It would be unreasonable to require a whole year as a basis for computation, and some stated period of the year must be selected to determine liability of the taxpayer for the whole year's income. An abode for the larger part of the year, as has previously been shown, is a fair and reasonable measure to determine the inclusion of taxpayers who are to share in the expense of government on an annual basis. This is no new conclusion. See *Attorney General v. Cootes* (1817) 4 Price 183, 146 Eng. Reprints 433. In that case, the statute made liable the entire annual income of every person who *actually resided* in Great Britain for six successive calendar months *from the commencement of the year in which said person should have been so resident.*

The Petitioners in the case of Mr. Woods make the point that the classification in the Maryland Income Tax Act of 1939 by which investment income was taxed 6% and ordinary income 2½% violates due process and equal pro-

tection clauses of the 14th Amendment to the Constitution of the United States in that it is purely arbitrary and unreasonable. It is submitted that the classification on its face is entirely reasonable. The Petitioners point to *Colgate v. Harvey,* 296 U. S. 404, 423 as authority to the contrary. As a matter of fact, *Colgate v. Harvey* sustains the position of Respondents on this point, and any possible force which the case had in upholding the Petitioners was done away with when *Madden v. Kentucky,* 309 U. S. 84, 93 specifically overruled *Colgate v. Harvey,* as to the one ground which might have conceivably sustained Petitioners.

CONCLUSION.

It is respectfully urged on behalf of the Respondents that the Petition for Certiorari should be denied for want of any Federal or substantial Constitutional question.

Respectfully submitted,

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